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From the Desk of
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September 12, 2012

Hon. Robert Young
Chief Justice
Michigan Supreme Court
3034 W Grand Blvd Ste 8-500
Detroit, MI 48202

Re: Administrative File 2010-34

Dear Chief Justice Young and Justices of the Court:

The court has published for comment two alternatives for possible amendment of MCR 6.419. The essence of the first alternative is that when the motion is made at the conclusion of the prosecution's case, the trial judge may "may reserve decision on the motion" and let the case proceed. The trial judge may then decide the motion 1) *before* the jury returns a verdict, in which case, no matter how egregiously mistaken granting the motion might be (so long as the ruling actually goes to one of the elements of the offense¹), the case would be over; or 2) after the jury returns a verdict of guilty, in which case, if the motion is granted, the prosecution may, if aggrieved, appeal, or 3) after a hung jury is discharged, in which case no matter how egregiously mistaken granting the motion might be (so long as the ruling actually goes to one of the elements of the offense), the case would be over.²

The second alternative does not allow reservation of a motion made at the end of the prosecution's case, but allows the trial court to reconsider its ruling, or an appellate court to entertain an interlocutory appeal from the ruling, until such time as the case is submitted to the jury. Where reconsideration is sought and denied, a 24-hour stay is required on request to allow the prosecution to seek interlocutory appeal.

¹ *People v Evans*, 491 Mich 1 (2012)(cert granted).

² *United States v. Martin Linen Supply Co.*, 430 US 564, 97 S Ct 1349, 51 L Ed 2d 642 (1977).

It is said that the current rule is “working.” It surely “works,” but one of the ways it works is to preclude review of erroneous rulings, even egregiously erroneous rulings, that end prosecutions forever. As some commentators have observed,

In all of . . . jurisprudence there is only one [trial] court ruling that is both absolutely dispositive and entirely unappealable. [Court rule] enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Though there is only one such rule in . . . jurisprudence, it is one too many. To permit a trial court to end a . . . prosecution without possibility of review runs directly counter to the principles of fairness and uniformity inherent in the process of appellate review. In our system, the privilege to be infallible is bestowed only along with the coincidence of finality, and the Supreme Court is the only . . . court whose word is final.³

Their proposed solution is, by rule, to “eliminate the power of trial judges to order pre-verdict judgments of acquittal,” that elimination best serving “the interests of justice and fairness.” Trial judges “still would be allowed to grant judgments of acquittal after the finder of fact had rendered a verdict,” and a revised rule “could even include a procedure whereby motions for a judgment of acquittal could be entertained mid-trial and be conditionally granted by the trial court at that time.” But the “directed judgment of acquittal . . . could not be entered by the trial judge until after the final verdict. If the jury agreed with the trial judge's assessment of the evidence and returned a not guilty verdict, the court's conditional judgment of acquittal would be moot. If the jury returned a guilty verdict, a governmental appeal would be permissible under *United States v. Wilson*.”⁴

The published proposals don't go nearly that far, but B gives the prosecution at least a fighting chance, on occasion, to gain review of an erroneous decision. Under proposal A, nothing prevents a trial judge from completely aborting a prosecution by erroneously granting a directed verdict before verdict; rather, under Proposal A the *option* is given to the trial judge to reserve decision, an option the judge need not exercise. Only proposal B gives the prosecution an

³ Richard Sauber, Michael Waldman, “Unlimited Power: Rule 29(A) and the Unreviewability of Directed Verdicts of Acquittal,” 44 Am U L Rev 433, 433-434 (1994).

⁴ Sauber and Waldman, at 452.

opportunity to convince the trial judge of his or her error by asking the judge to reconsider, and a 24-hour window to gain appellate review on the claim that the trial judge has erred.

There is no reason for these two alternatives to be “alternative.” Proposal A doesn’t *require* a judge to defer the ruling, and when deferring it, doesn’t require it be deferred until after verdict. And it doesn’t allow for reconsideration or any possibility of review of a granted motion. It is, though, as far as it goes, good policy. It is taken from the FRCP 29(b), which was added to the federal rule in 1994, and the Advisory Committee note states that its purpose was to “remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.” Proposal B allows for reconsideration and possible review, and is not inconsistent with the policy behind allowing reservation of the ruling. If, for example, proposal A was adopted, and the trial judge did *not* reserve the ruling, proposal B would give the prosecution a chance to ask for reconsideration and to seek interlocutory appeal. The policy consideration stated in the Advisory Note for the language in proposal A—to “remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion”—is compatible with the policy consideration in proposal B of giving the prosecution a chance to gain reconsideration and appellate review. I urge the court, then, to adopt *both* “alternatives” (see below), but if one has to choose, proposal B, giving the prosecution a chance to gain reconsideration and appellate review, is the better choice.

Adoption of proposals A and B

(A) Before Submission to the Jury. After the prosecutor has rested the prosecution’s case-in-chief or after the close of all the evidence, the court on the defendant’s motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government’s evidence, the defendant may offer evidence without having reserved the right to do so.

(B) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(C) Reconsideration of Ruling Made Before Submission to Jury. The trial court may reconsider its decision granting a directed verdict, and an appellate court may entertain an interlocutory appeal from a decision granting a directed verdict, until such time as the case is submitted to the jury. If reconsideration is sought and denied, the court shall, on request, grant a stay of at least 24 hours to permit the prosecuting attorney to seek appellate review.

Thank you for your consideration.

Very truly yours,

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